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HOBBY LOBBY AND CORPORATE PERSONHOOD: TAKING THE U.S. SUPREME COURT'S REASONING AT FACE VALUE

*Gregory A. Mark**

INTRODUCTION

Some years ago I wrote of corporate theory:

The personification of the corporation was once of central concern to American jurisprudence. Diverse political and economic views, phrased in the language of legal discourse, were essential to discussions of the corporation's design, form, function, and operation. After the Second World War, however, the place of the corporation in law had ceased to be controversial, and both theoreticians and practitioners concerned themselves instead with organizational theory and economic analysis of corporate behavior.¹

Oops, my mistake. Then again, maybe not. Discussions of corporate personality, certainly in the public arena, are enjoying a recrudescence of sorts. The cry "corporations are not people!" for example, has been made in many forms on editorial pages² and has been heard in the streets.³ This insistent cry, especially after *Citizens United v.*

* Professor of Law, DePaul University College of Law. I am indebted to Stephan Landsman for many things, not the least of which is the opportunity to participate in this session of the Clifford Symposium. The William S. Boyd School of Law, University of Nevada, Las Vegas, and the College of Law, University of Tulsa generously gave me the opportunity to develop some of my views at faculty workshops before the Symposium. I had the rare opportunity to test my responses to issues raised at the symposium at faculty workshops at the Rutgers School of Law–Newark and the Legal Studies and Business Ethics Department of the Wharton School, University of Pennsylvania during which, of course, even more interesting questions were raised. Regrettably, many of those could not be answered in this Article. I also thank Caroline Winsett for assisting me in the preparation of this piece.

1. Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441 (1987).

2. See, e.g., Joseph Paul Dorchack, Opinion, *Corporations Are Not People*, CHI. TRIB., Feb. 17, 2014, http://articles.chicagotribune.com/2014-02-17/opinion/chi-letter-corporations-are-not-people-021714_1-petroleum-citizens-united-decision-corporation; Dick Durbin, Opinion, *A Decision To Desert America*, CHI. TRIB., July 24, 2014, at 19; Editorial, *Corporations Aren't People, Don't Merit Special Protections*, BOS. GLOBE, Jan. 23, 2010, http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2010/01/23/corporations_arent_people_dont_merit_special_protections/; Editorial, *The Rights of Corporations*, N.Y. TIMES, Sept. 22, 2009, at A30.

3. See, e.g., Eleanor Goldfield, "Corporations Are Not People": *A Lawyer's Book About Fighting Back Against Corporate Personhood*, OCCUPY.COM (Dec. 19, 2014), <http://www.occupy.com>

Federal Election Commission,⁴ has led to demands that officialdom curb that case's seeming release of corporate power, some demands going so far as to advocate amending the Constitution to truncate the rights of the corporate person.⁵ In the courts, in the practice of business, in the practicing bar, and the legal academy; however, the question of corporate personality has not much resurfaced, notwithstanding *Citizens United* and *Burwell v. Hobby Lobby Stores, Inc.*⁶ By this, I mean that in some cases nothing is being said and in other cases nothing *new* is being said. Perhaps I was correct after all more than a quarter century ago. Others seem to think similarly (albeit while adopting a more cautious "wait and see" posture in anticipation of controversies surrounding the Religious Freedom Restoration Act of 1993 (RFRA)).⁷

What is striking, however, is that in anticipation of the Court's decision in *Hobby Lobby*, legal academics lined up on opposite—and mostly entirely predictable—sides. One side advanced the view, embodied in an amicus brief and seemingly adopted by Justice Ginsburg's dissent, that the legal separation of ownership and entity entailed by the status of corporate personhood demands that the Court recognize the utterly secular nature of the business corporation.⁸ The other side advanced the view, embodied in another amicus brief and seemingly by the Court's opinion, that personhood is but a fiction and that the entity is but a device to further the ends of human beings associated in an enterprise, human beings who sacrifice nothing

.com/article/corporations-are-not-people-lawyers-book-about-fighting-back-against-corporate-personhood.

4. 558 U.S. 310 (2010).

5. See, e.g., S.J. Res. 33, 112th Cong. (2011); Alexander Burns, *Elizabeth Warren Assails Supreme Court As Too Far Right*, POLITICO (Sept. 8, 2013, 7:47 PM), <http://www.politico.com/story/2013/09/elizabeth-warren-supreme-court-far-right-96449.html>; *We the People, Not We the Corporations*, MOVE TO AMEND, <http://movetoamend.org> (last visited Aug. 26, 2015); PUBLIC CITIZEN, <http://citizen.org> (last visited Aug. 26, 2015); Press Release, Durbin: Women and Families Have a Right To Know If Employers Plan To Restrict Health Coverage, (June 30, 2014), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-women-and-families-have-a-right-to-know-if-employers-plan-to-restrict-health-coverage>.

6. 134 S. Ct. 2751 (2014).

7. See 42 U.S.C. §§ 2000bb to bb-4 (2012); Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. 70 & n.3, 71 (2013), <http://cornelllawreview.org/files/2013/12/99CLRO70-November.pdf> ("I am too much of a legal realist to think that these questions hold any interest after John Dewey, *The Historic Background of Corporate Legal Personality*, 37 YALE L.J. 655 (1926). I observe, though, that some of the emerging literature on the contraceptive mandate appears to be reviving interest in that question.").

8. *Hobby Lobby*, 134 S. Ct. at 2787, 2797 (Ginsburg, J., dissenting); Amicus Curiae Brief of Corp. & Criminal Law Professors in Support of Petitioners, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 3-356), 2014 WL 333889, at *7–8.

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rights-wise in joining together.⁹ That division of understanding was alive when I first wrote of the personification of the corporation and has in its quietude remained largely at a standstill since, which was what I meant when I finished the paragraph previously quoted:

The historical and jurisprudential debates which had consumed the energies of some of the leading legal scholars were relegated to the introductory pages of corporation law textbooks, if they were discussed at all. As a result, a modern lawyer knows only that a corporation is considered a legal person but finds that terminology devoid of content.¹⁰

Youthful overstatement, perhaps, in claiming that personhood was devoid of content but largely correct in the view that personhood per se was not outcome determinative.

This is not the place in which I intend to review the history of personification; neither do I intend to suggest that the U.S. Supreme Court has inaugurated a new chapter in the debate over personification (though I think it has not done so). I do, however, think it important to note that the U.S. Supreme Court is not a court that thinks much about corporate law, nor need it, given that corporate law is regarded as the province of the states. I would be more concerned about *Hobby Lobby* were it the decision of the Delaware Supreme Court.¹¹ In that concern I am apparently in good company.¹² One of the U.S. Supreme Court's jobs is to determine what federal rights people enjoy. The Court claims it did this, and did so purely as a matter of statutory interpretation.¹³ What I suggest, however, is that the Court's opinion lacked nuance. In lacking nuance, it contained errors. Those errors have consequences. At minimum, the consequences will require the Court to revisit some questions, will require lower courts to speculate unnecessarily, and will leave state courts, whose business it is to resolve intracorporate disputes, with unexpected burdens.

9. Amicus Curiae Brief of Ctr. for Constitutional Jurisprudence & St. Thomas More Soc'y of Orange City as Amicus Curiae in Support of Hobby Lobby & Conestoga, et al., *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), 2014 WL 316718, at *4, *8-9.

10. Mark, *supra* note 1, at 1441.

11. Indeed, I toyed with titling this Article, in all irony, "Thank God It Is Not a Decision of the Delaware Supreme Court."

12. See, e.g., Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications* (Univ. of Pa. Law School, Inst. for Law & Econ., Research Paper No. 15-2, 2015), http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2560007_code711466.pdf?abstractid=2555816&mirid=1.

13. *Hobby Lobby*, 134 S. Ct. at 2759.

At first glance, *Hobby Lobby* seems both an easy case and correctly decided. RFRA applies to persons, but it does not define “person.”¹⁴ The Court therefore turned to the Dictionary Act¹⁵ for guidance. The Dictionary Act defines “persons” under federal law to include corporations.¹⁶ In *Hobby Lobby*, the plaintiffs included business corporations. The plaintiffs claimed that their religious beliefs were burdened by the contraceptive mandate of the Patient Protection and Affordable Care Act (ACA).¹⁷ In keeping with its self-imposed stricture barring inquiry into religious sincerity, the Court eschewed an inquiry into the sincerity of this belief.¹⁸ The Court then asked if the burden met the “least restrictive” method test embodied in RFRA.¹⁹ The mandate failed the statutory test because there was another way to pay for the mandated contraceptive coverage other than requiring the corporations to purchase insurance providing for payment of certain contraceptives.²⁰ Therefore, the mandate violated rights protected by RFRA. Simple case.

The problem with the simple, albeit extended, syllogism is that it does not accurately capture what the Court did. Somewhere between the fourth and fifth steps, the Court introduced a new premise. Perhaps because, on the face of the matter, claiming that business corporations have religious beliefs that might be offended or compromised by mandated acts seemed a step beyond plausible, the Court substituted a new and more complicated premise. Perhaps it did so simply because it had to answer the claim of the defendant that “the companies cannot sue because they seek to make a profit.”²¹ Or, perhaps it did so to answer the Third Circuit’s holding that “[g]eneral business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees*, exercise religion.”²²

For whatever reason, the Court introduced a new issue, indeed, a new one with variable implications, in two parts. First, it accepted the

14. *Id.* at 2768 (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” (quoting 42 U.S.C. § 2000bb-1(a) (2012))).

15. 1 U.S.C. § 1 (2012).

16. *Hobby Lobby*, 134 S. Ct. at 2768 (citing 1 U.S.C. § 1).

17. *Id.* at 2759, 2765. *See generally* Pub. L. No. 111-48, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

18. *Id.* at 2774–75.

19. *Id.* at 2780 (“[W]e will proceed to consider the final prong of the RFRA test . . . whether HHS has shown that the contraceptive mandate is ‘the least restrictive means of furthering that compelling governmental interest.’” (quoting 42 U.S.C. § 2000bb-1(b)(2))).

20. *Id.* at 2780–82.

21. *Id.* at 2767.

22. *Hobby Lobby*, 134 S. Ct. at 2768.

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claim about the nature of institutions, that is, the claim that “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”²³ Two aspects of the Court’s phrasing stand out. First, the phrasing is one of action—“do”—not belief or embodiment. A corporation must act. It is not an entity that contains belief, and, in this context, “exercise” becomes only an act.²⁴ Therefore, the corporation is not an entity that embodies something greater than its members. I trust that patient readers will not think this observation is one too detailed to matter or that it is one beside the point. After all (in discussing the religious convictions of the owners of Conestoga’s equity a scant few paragraphs before), the Court said something quite different about another entity. It noted that “Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and *believes* that [a fetus is a human].”²⁵ In other words, the Mennonite Church can act as an entity separate and apart from its members; it can “oppose.” What is more, it can believe and contain a belief, indeed, it can contain a belief system. How else to understand the Mennonite Church as part of Christianity in which one instantiation of Christianity’s belief system, on the Mennonite view, is opposition to abortion? To borrow the Third Circuit’s language, an entity can embody belief systems and maintain doctrinal positions independent of the belief systems and doctrinal positions of individual members. To say otherwise would, indeed, be heresy in some religions.²⁶ And, of course, as a matter of constitutional law, absolute protection is accorded belief systems and doctrine. The action—the regulatory action—is, if you will, in institutional actions, not in belief, belief systems, or religious doctrine.

23. *Id.*

24. *Id.* The requirement for action becomes especially problematic because a belief system is not an act. But, the Court separated “belief system” from “actions” with an “or” when discussing the constituent elements of religious exercise. Thus, the common sense point the Court makes about institutional action being human action is at odds with the other common sense view: institutions themselves do not have minds that can embody belief systems, only human beings can.

25. *Id.* at 2764 (emphasis added) (quoting *Statement on Abortion*, MENNONITE CHURCH USA, <http://www.mennoniteusa.org/resource-center/resources/statements-and-resolutions/statement-on-abortion/> (now located at [http://www.anabaptistwiki.org/mediawiki/index.php?title=statement_on_Abortion_\(Mennonite_Church_USA,_2003\)](http://www.anabaptistwiki.org/mediawiki/index.php?title=statement_on_Abortion_(Mennonite_Church_USA,_2003)))).

26. If heresy is too strong a way to understand dissonance between individual beliefs and acts as well as institutional beliefs and acts, then perhaps a milder phrasing is more persuasive: the church has teachings; individuals may sin.

Second, and more importantly, in the Court's view, the entity's belief system is adopted by members, not the other way around. The church, as the Court notes, has "members." Indeed, in expressing what it means to adopt Mennonite beliefs, the footnote in the opinion cites a church statement, not a statement of members, for which the author is the collective body, not merely a group of agreeing individuals, such as signers of a petition, a political advertisement in a newspaper, or a collective letter to the editor.²⁷ The point is not theological. Rather, it suggests that the Court was perfectly capable of recognizing a traditional, perhaps controversial, understanding of entity theory: an entity can stand apart from its members for certain purposes. For purposes of religious exercise in which the person is a business entity, however, the Court did not reach the same conclusion; instead, it looked through the entity to its members.

With that step, the Court suddenly reentered the age-old debate surrounding the personification of the business corporation. It did so, however, while making a key distinction that it then chose to ignore, that for some purposes, one looks to the business entity and for others, to the owners of the business entity's equity. It did so by confining itself to corporate acts. The Dictionary Act, as the dissent points out, requires that courts look to the context in which a corporation is being considered a legal person before assessing whether, as a person, it is covered within the meaning of the law.²⁸ All the more strange then that the Court decided to look to a resolution adopted by the board of directors of Conestoga²⁹ and Hobby Lobby's "statement of purpose" (of unclear provenance)—both, as a matter of law, statements of the entities, not their equity holders—to assess whether the owners of the equity (or the beneficiaries of a trust owning the equity) had their free exercise rights compromised by a mandate requiring the entities to provide contraceptive coverage that the equity holders found objectionable. For purposes of assessing whether the equity owners' rights were compromised, the only necessary step would have been to identify the religious beliefs of the equity owners, full stop. The position taken by the entity should not matter.³⁰ Indeed, under

27. *Id.* at 2764 & n.12.

28. *Id.* at 2793–94 (Ginsburg, J., dissenting) ("We therefore Look to the Dictionary Act, which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.'" (alteration in original) (quoting 1 U.S.C. § 1 (2012))).

29. *Hobby Lobby*, 134 S. Ct. at 2764–65.

30. Although I am not an evidence scholar, the statements appear to be hearsay in the form that they are used. They may be business records, but even under that exception they were not used as evidence of the position or acts of the entities but, rather, as accurate (indeed definitive) descriptions of the beliefs of individual human beings—the shareholders—not the corporate au-

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the Court's sweeping discussion of the fictive nature of corporations,³¹ those positions are either impossible or irrelevant except as further evidence of the owners' beliefs. Note that to assert the rights of its owners' equity, the collective acts of the entity are beside the point; entities exist solely as vehicles to "provide protection for human beings."³²

Worth remembering, however, is that theory and precedent are two different concepts. To say that the Court personified the business corporation says nothing that the Court has not said before. To say that it adopted, for precedential purposes, a theory of the corporate person is a very different matter. The latter assertion would not only substitute theory for precedent, it would also run contrary to the multifarious ways by which the Court has protected the rights of the corporate person. *Citizens United*, for example, reiterated a long-standing understanding that corporate entities have free speech rights and did so without reference to the human beings who play a role in the corporation, even a nonprofit one, which has no shareholders whatsoever.³³ No one can legitimately claim that a publicly held corporation asserts the free speech rights of the owners of a corporation. When protection of the concerned individuals is the question, the best one can say is that a corporation's speech is protected because, by speaking, the corporation seeks to protect of its owners' interests. But, of course, that speech is formulated by individuals in their managerial capacity, not in their capacity as owners. Shareholders may no more substitute their speech for that of managers than they may otherwise act on behalf of the corporation. The shareholders of a publicly traded company may have quite diverse views on matters concerning which their corporation speaks. They may never know the position the corporation takes, even if they might agree with it. The degree of enthusiasm, even for commonly held positions, may differ; thus, the expression itself may not reflect the relative ardor even for supporters of the corporation's position. The point is clear, and it is also one the Court appears to understand. Corporations speak in ways that may not reflect the positions of their equity owners.

thor. So far as I have been able to ascertain, all the individuals who cared (the shareholders), would have been available to provide their own in-court statements. Of course, to the extent that the statements are used to characterize the beliefs of other human beings whom the court identifies as part of the corporation, such as employees, their use is even more problematic. See discussion *infra* note 38 (discussing the role of individual human beings).

31. *Hobby Lobby*, 134 S. Ct. at 2768.

32. *Id.*

33. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).

Where publicly held corporations are concerned, however, the Court seems to acknowledge that the diversity and intensity of equity owners' religious convictions make it unlikely that the publicly held corporation will assert RFRA claims. Indeed, the Court came close to giving the back of its hand to the concern that the "corporate giants to which HHS refers will often assert RFRA claims" because "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable."³⁴

II. THE FIRST AMENDMENT CORPORATE PERSON: SPEECH & FREE EXERCISE COMPARED

The Court's First Amendment understanding of the corporate person needs some unpacking. In corporate speech cases, the Court recognized that the entity spoke. Managers articulate a corporate person's speech. The Court has never asked whether the managers personally believed what they said and wrote or whether the entity's owners did. Rather, the presumption has been that the speech furthered the aims of the entity. Indeed, this has been the Court's presumption so much so that the issue regarding legitimate representation of institutional interest has never come up, much as the sincerity of religious belief appears to be beyond judicial scrutiny. But, speaking is an act. Speaking cannot take place without human beings. The beliefs represented by the speech, however, may be embodied in an institution just as the institutional interests are embodied in the speech articulated by managers. But, if, as the Court suggests, the theory of the corporate fiction "is to provide protection for human beings,"³⁵ then how can we account for a precedent that recognizes an institutional framework (the corporation) that does not, indeed cannot, reflect (much less protect) the varied interests of the actual human beings who own its equity when speaking (on behalf of its owners) but zealously ignores that institutional framework when the institution exercises religion (on behalf of its owners)?

Accounting for the precedent of the personified corporation is different than accounting for the theory of the corporation that might be embodied in that precedent. The theory can be easily kicked down the road, as it has been historically.³⁶ The accounting for the precedent is, however, all the more difficult if we take seriously the Court's

34. *Hobby Lobby*, 134 S. Ct. at 2774.

35. *Id.* at 2768.

36. See generally Mark, *supra* note 1, at 1441–45, 1478–79 (describing the historical understanding of the corporation).

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stated theoretical understanding that it is the rights of actual human beings that must be protected. If the human beings' views can be left unsought, compromised, or even contradicted in the one case (speech), then why do courts afford such assiduous protective attention in the other (religion)? The question is all the more important because the right compromised in the one instance is, on its face, nakedly constitutional (speech) and only derivatively so through RFRA in the other instance (religion).

What the corporate person means as a statutory matter therefore depends, not just for Dictionary Act purposes but for foundational purposes, on interpreting the rationale for corporate existence in the first place. The Court claimed to have made this inquiry; it made it, however, in a manner that is striking for its explanatory thinness. The Court rightly noted: "A corporation is simply a form of organization used by human beings to achieve desired ends."³⁷ It is not controversial to say that corporations exist at the behest of human beings. What is controversial is which human beings count for deciding on the "desired ends." Others have noted that, to be a bit understated, the Court is not exactly clear which human beings count.³⁸ To be sure, the holding applies to "owners."³⁹ But, the Court simply cannot mean that literally. While both the U.S. Supreme Court⁴⁰ and the Tenth Circuit⁴¹ note that Hobby Lobby (and its companion, Mardel) are managed by trusts, they fail to note that the trusts are, in fact, the owners of the voting equity; however, the district court did not forget.⁴² The district court also noted that the ownership structure of Hobby Lobby was unclear because the ownership of the nonvoting

37. *Hobby Lobby*, 134 S. Ct. at 2768.

38. The Court noted that potential human beings include owners, managers, and employees as those whose rights are protected through the corporate form. *Id.* at 2768. Which rights are protected, of course, is also not clear. The obvious potential conflict between the rights of owners, who assert a free exercise claim and employees, whose insurance coverage is compromised, thus compromising their reproductive rights, is but one aspect of the conundrum—one the Court avoids through the thought experiment of governmental assumption of payment coverage. To borrow Justice Ginsberg's voice, it is also "passing strange" that managers are a separate category because their managerial role is ignored as a matter of law and replaced by the de facto control of a unanimous block of owners with the right to vote. *Id.* at 2794 n.12 (Ginsberg, J., dissenting).

39. *Id.* at 2759.

40. *Id.* at 2765.

41. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013).

42. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd*, 134 S. Ct. 2751 ("[The members of the Green family own and operate] Hobby Lobby and Mardel, . . . through a management trust, *which owns all the voting stock in the corporations.*" (emphasis added)); *see also* Verified Complaint at 9, *Hobby Lobby*, 870 F. Supp. 2d 1278 (No. CIV-12-1000-HE), 2012 WL 4009450.

equity was not set out before the court.⁴³ Thus, notwithstanding the apparent linguistic clarity of the first few sentences of the U.S. Supreme Court's opinion, its meaning simply cannot be correct. Those who benefited from the corporate structure did not opt to use only one legal device, the corporate form, to separate themselves from some of the consequences of doing business and to take advantage of others, but at least one other: the trust. When is the law bound to see the naked religious convictions of those who opt to separate themselves from the consequences of their decisions through not one, but two, legal shields? Traditionally, when the business corporation is incorporated under the enabling business codes of the state, the answer has been, never.

Whether a trust is a legal person within the meaning of the Dictionary Act is not at all clear.⁴⁴ Trusts are not among the enumerated entities that count as persons, at any rate. But, trusts are certainly not human beings. If they are not persons under the Dictionary Act, then it is unclear how a court should look through the trust to its beneficiaries, if they are the appropriate humans to consider, to see whether their religious exercise has been compromised under RFRA.⁴⁵ Moreover, because a corporation's equity owners include nonvoting equity owners under all corporate law in the United States, if the district court is to be believed that their interests were never clarified, no one knows whether those owners have a claim that their religious exercise has been violated or even whether they agree with the position taken by the trustees. So, under the corporate structure of Hobby Lobby, apparently the disembodied trust can assert—although it is neither corporeally nor legally a person—free exercise claims as an owner, again, presumably, on behalf of beneficiaries. But, the claims of human beings who actually own nonvoting equity remain in limbo, both unspecified and unclear. The interests of employees who might be indifferent or opposed to the free exercise claim are ignored, as might their claims of conscience or reproductive rights, because those claims are apparently not religious. The rights and claims of the man-

43. *Hobby Lobby*, 870 F. Supp. 2d at 1284 n.6.

44. A trust's entity status in law is complicated as a matter of historical jurisprudence. In the oral version, which was given at the 2015 Clifford Symposium: *The Supreme Court, Business and Civil Justice*, I had said based on the Court's claim that the trust owned the shares: "To be clear, the trust is a legal entity." Gregory A. Mark, Address at the Clifford Symposium: *The Supreme Court, Business and Civil Justice* (Apr. 16, 2015). That is not necessarily true; at least it is far from clear that the trust in current jurisprudence, especially the "management trust" to which the Court refers, is a legal entity. *Hobby Lobby*, 134 S. Ct. at 2765 n.15.

45. Of course, the question becomes even more problematic if the question is the religious exercise of the settlor because the settlor need no longer be alive, a fact about which we know nothing from the opinions.

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agers' (who are also employees) consciences are equally ignored. In the case of managers, however, it is they who must act on behalf of the corporation in its corporate capacity whether they agree with the acts they are required to perform or not, just as managers who speak for a corporation may not hold the beliefs they enunciate on behalf of the corporation.

In the end, the Court's language regarding whose religious exercise the fictive corporation must embody remains unclear. The overwhelming use of the term "owner" suggests that it is the owners' exercise that must be protected. That said, as I and others have noted, the Court includes employees and "others associated with the corporation" among those protected by its understanding of the corporate person.⁴⁶ As the Court notes in discussing the fictive theory it seems to adopt: "An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."⁴⁷ However, a scant few sentences later, the Court appears to limit which people associated with the corporation may possess free exercise rights: "And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies."⁴⁸ The limiting principle by which others (notably employees) are excluded from the free exercise protection is left unstated. With that said, it is curious that in the constitutional examples that precede the statutory extension under RFRA enunciated by the Court, which involved the Fourth Amendment and the Takings Clause of the Fifth Amendment, no such limiting principle was invoked. To the contrary, the Court was quite expansive. The Fourth Amendment protects "the privacy interests of employees and others associated with the company."⁴⁹ If possible, the

46. See, e.g., Eric W. Orts, *Theorizing the Firm: Social Ontology in the Supreme Court*, 65 DEPAUL L. REV. (forthcoming 2016).

47. *Hobby Lobby*, 134 S. Ct. at 2768.

48. *Id.*

49. *Id.* As written, this sentence can only mean that owners of nonvoting equity, which by definition play no part in day-to-day control, do not have protected free exercise rights. If that is the case, then: (1) voting equity owners have religious rights and nonvoting equity owners do not; (2) employees and an undefined universe of stakeholders might have protected religious rights; and (3) trustees who manage an entity have religious rights insofar as they assert the rights of the trustees, the beneficiaries, or the settlors, though which, if any, of those human beings count has been left unspecified. Of course, a trustee may be an entity, such as a bank or even a government. It is "turtles all the way down." Thus, the case presents a remarkably opaque jurisprudence.

Fifth Amendment protections appear even more capacious. “Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations’ financial well-being.”⁵⁰ Without a lengthy exegesis of stakeholder theory, at minimum those who have a stake would include all creditors.

Perhaps it is an exercise in over-reading to pay strict attention to the constitutional examples the Court uses. But, again to borrow the dissent’s language, in a case involving the contraceptive mandate under the ACA, it is “passing strange” that the Court invokes the privacy rights of employees under the Fourth Amendment and ignores the privacy-based reproductive rights of employees, which it has found as an emanation of many parts of the Constitution, including the Fourth Amendment.⁵¹ The only explanation I can posit—and I am but a legal historian, not a constitutional lawyer—is that the Court does not understand that the ACA’s provision requiring contraceptive funding constitutes an emanation of a privacy right within the meaning of the Court’s jurisprudence. Moreover, having provided for contraceptive care under the ACA, Congress did not intend for the denial of such care to be a constitutional violation because it left room for the thought experiment that I earlier suggested the Court initiated when it proposed that the federal government could pay for such care.

Clarifying who counts in the Court’s fictive corporation will, of course, be required by the U.S. Department of Health & Human Services (HHS) in trying to develop regulations consistent with the Court’s decision. This task will not be so easy for reasons of corporate law unplumbed by the Court, as I will suggest. As a preliminary matter, the lower courts will have the task of resolving the constitutional and statutory conundrums left in the wake of *Hobby Lobby*.

III. THE CORPORATE LAW CONTEXT

When the Court first mentioned “the established body of law” dealing with the “rights and obligations” of shareholders and officers, among others, it had to have meant state corporate law because it is that law that creates the legal fiction at the core of the Court’s concern.⁵² For purposes of this Article, I focus on but one other question

50. *Id.*

51. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (referring to the Fifth and Ninth Amendments); *id.* at 488 (Goldberg, J., concurring) (referring to the Fourteenth Amendment); *id.* at 500 (Harlan, J., concurring) (referring to the Fourteenth Amendment); *Poe v. Ullman*, 367 U.S. 497, 548–53 (1961) (Harlan, J., dissenting).

52. *Hobby Lobby*, 134 S. Ct. at 2768.

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of corporate personification besides who is embodied in the corporation. That question is foundational: For what purposes are corporations created under state statutes? Stated otherwise, why create a legal person at all?

In man's social ways, sometimes formality serves a purpose. Creating a formal organization recognized at law does many things. Where corporations are concerned, formality creates an entity that: (1) can sue and be sued; (2) has a life that does not depend for its continuance on the life of its members; (3) has a structure by which the entity can continue to exist even when membership turns over; and (4) has other attributes, which are largely the result of positive law. For these reasons, corporations exist. Corporations are a particular subset of entities created by law, and, today, the most conspicuous of these entities is the business corporation. But, the business corporation did not simply spring into existence. To the contrary, and this point is an ancient one, business corporations owe their conceptual framework as organizations independent of the state to a peculiar evolution. Even limiting oneself to the United States, the business corporation had conspicuous models with lengthy lineage. Entities mixing public and private attributes, after all, were the basis for some of the colonies. From those origins the hierarchical structure characteristic of the corporation evolved. In parallel, religious corporations were plentiful throughout the United States long before businesses adopted the same form.⁵³ Both hierarchical in form (in the vast majority someone led the congregants) and participatory in character, the congregants had a voice in the selection of those who led. Religious corporations also held property independent of both the state and congregants. Charitable corporations evolved along similar lines. Both were far more numerous than business corporations until well into the nineteenth century. Indeed, the jurisprudence of the corporation over the nineteenth century was devoted to figuring out which attributes belonged with which type of entity. That ground I, and others, have covered, and little purpose is served going over it again. Also, this Article is not concerned with whether the Court has, over the past century and a half, adopted a view of the corporation that is either consonant with the different amici here or not. Others, notably Professors Elizabeth Pollman and Margaret Blair, explored that question.⁵⁴ Nor, to

53. Sarah Barringer Gordon, *The African Supplement: Religion, Race, and Corporate Law in Early National America*, 72 WM. & MARY Q. 385, 389 (2015).

54. See, e.g., Margaret M. Blair, *Corporations and Expressive Rights: How the Lines Should Be Drawn*, 65 DEPAUL L. REV. (forthcoming 2016); Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. (forthcoming 2016).

follow Professor Tushnet and my own claim of more than a quarter century ago does it seem to me that much follows from identifying the theory of each of the personification cases adopted by the Court because it so evidently does not view this theory as precedent. Rather, this Part of the Article explores the Court's reading of state law and corporate purpose, which is the vehicle for reading the Free Exercise Clause into corporate structure.

In explaining why corporations exist and have the attributes that they do, two common, although perhaps incompatible, modes of explanation exist. For example, one can explain why the attribute of corporate limited liability exists by reference to the salutary objects and necessities of its contemporary existence.⁵⁵ Or, one can say that it is a historical artifact that owes its existence to a number of contingent factors. But, one cannot coherently say both simultaneously unless the evidence is that the factors of contemporary existence were present when the attribute came into existence and were of explanatory power as the attribute evolved.⁵⁶ Similarly, absent historical context, one might say that the words embodied in a statute appear to be clear, unambiguous, and capacious. The historian might say "true enough, but that reading betrays the context in which those words were put to paper." If taken in the context of other words put to print, they actually mean something quite different from what they can be taken to mean as a modern matter.

The Court needed to decide whether the language of the corporate enabling statutes of Oklahoma and Pennsylvania (the states of incorporation), which empowered those jurisdictions to grant corporate charters to business corporations and to "pursue any lawful purpose," meant that the corporations could do anything.⁵⁷ This included taking actions otherwise required by law but for which a corporation might obtain an exemption not motivated by business considerations but also not self-abnegating as long as they were, again, not prohibited by law. Could the phrase "any lawful purpose," mean managing a corporation (a term advisedly used given the Court's own emphasis on ownership not management) with the animating Christian beliefs of the owners informing managerial decision making, such as deciding the insurance benefits of employees, in a manner that allowed for corpo-

55. See generally Alan J. Meese & Nathan B. Oman, Essay, *Hobby Lobby, Corporate Law, and the Theory of the Firm*, 127 HARV. L. REV. F. 273 (2014).

56. E.g., Gregory Mark, *On Limited Liability: A Speculative Essay on Evolution and Justification*, in TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 169, 184 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

57. *Hobby Lobby*, 134 S. Ct. at 2771-72 (citing OKLA. STAT., tit. 18, §§ 1002, 1005 (West 2015) and 15 PA. CONS. STAT. § 1301 (2001)).

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rations to legitimately seek RFRA protection from the mandates of the ACA?⁵⁸ In other words, was a form of Christian managerialism a lawful corporate purpose under state law for the purpose of suing to avoid a legal mandate?

A simple reading of the phrase, “any lawful purpose,” is easy. The Court duly noted that corporations can, in many jurisdictions, voluntarily adopt practices that appear to be charitable, indeed, in some cases, practices that appear to limit corporate profitability.⁵⁹ From that premise, the conclusion is equally easy: “If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.”⁶⁰ The plain language suggests a broad interpretation, and the Court gave it one.

But, the plain language is embedded in the enabling statutes of a particular type of corporation. Moreover, the class of corporations for which the enabling statutes exist lies side-by-side with enabling statutes for other types of corporations. Each class of statutes enjoys its own history, which informs the meaning of the texts. Whether they constrain the interpretation of the plain language may be another matter, but serious consideration of the enabling statutes’ language requires more than a perfunctory consideration of that history. Justice Ginsburg brought this question to the Court’s attention in her dissent.⁶¹ Citing venerable jurisprudence, she correctly noted that “history is not on the Court’s side. Recognition of the discrete characters of ‘ecclesiastical and lay’ corporations dates back to Blackstone, . . . and was reiterated by this Court centuries before the enactment of the Internal Revenue Code.”⁶² The Court batted her objection away in the concluding portion of a footnote, noting:

The dissent also believes that history is not on our side because even Blackstone recognized the distinction between “ecclesiastical and lay” corporations. . . . What Blackstone illustrates, however, is that dating back to 1765 there was no sharp divide among corporations

58. *Id.* at 2770–72, 2711 n.25 (citing Benefit Corporation, BENEFIT CORP. INFO. CENTER, <http://www.benefitcorp.net/state-by-state-legislative-status>); *see e.g.*, S.C. CODE ANN. §§ 33-38-300, 33-38-130 (Supp. 2012); VA. CODE ANN. §§ 13.1-787, 13.1-626, 13.1-782 (2011)).

59. Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 20 (2014–2015) (citing *Hobby Lobby*, 134 S. Ct. at 2771).

60. *Hobby Lobby*, 134 S. Ct. at 2771.

61. *Id.* at 2796–97 (Ginsburg, J., dissenting).

62. *Id.* at 2796 (Ginsburg, J., dissenting) (citation omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 458 (1765)). To be sure, she was off a bit in her timing. The first income tax funded the Civil War, whereas the Internal Revenue Code came a bit later. Neither tax was enacted “centuries” after the Court came into existence, so the Court could not have “reiterated” the ecclesiastically or lay distinction on Ginsburg’s timetable. That said, her reading of *Terrett v. Taylor* and *Trustees of Dartmouth College v. Woodward* is not just plausible, but accurate, so that her misstatements of chronology hardly undermine her point.

in their capacity to exercise religion; Blackstone recognized the even what he termed “lay” corporations might serve “the promotion of piety.” . . . And whatever may have been the case at the time of Blackstone, modern corporate law (and the law of the States in which these three companies are incorporated) allows for-profit corporations to “perpetuat[e] religious values.”⁶³

The Court’s language is curious. It invoked historical authority only to dismiss it and seemingly agreed that history—or at least the historical sources it cited—was not on its side. By invoking historical sources, however, it seemed to suggest, or at least to legitimate as an interpretive matter, that “modern corporate law” derives some meaning from its antecedents, even if Blackstone is not exactly the history the Court needed. Indeed, it was not; Blackstone was hardly the relevant historical citation. First, when Blackstone wrote, the United States did not exist. The corporations to which he referred were English and granted by the King or the King-in-Parliament. That England had an established religion, therefore, no separation of church and state, and a profound history that included religious persecution and subordination of adherents other than the Anglican faith, suggestive of a history in which the freedom of owners of corporations is not to pursue idiosyncratic religious aims is a freedom that would have been much recognized in 1765 England. In any case, even though the individual states are the successors to the King-in-Parliament, their powers were fundamentally altered by intervening events with some juridical significance: to wit, the American Revolution and the state constitutions that immediately followed, the adoption of the Constitution, the subsequent alterations to the individual state constitutions, and the adoption of the Fourteenth Amendment. Moreover, even if we take at face value Blackstone as the touchstone reference, he was referring to a radically different regime of incorporation.

In Blackstone’s era, corporate charters were individually granted. They were also just as much instruments of statecraft as they were of entrepreneurialism. Indeed, they were designed to harness entrepreneurialism in the service of statecraft. To use an obvious example from approximately a century before the Commentaries but still in force when Blackstone wrote, the Hudson’s Bay Company was both designed to colonize and make a profit. Its charter had explicitly religious clauses, including the power “to continue or make Peace or War with any Prince or People whatsoever, that are not Christians.”⁶⁴

63. *Id.* at 2770 n.23 (citations omitted) (third alteration in original) (citing 1 BLACKSTONE, *supra* note 61, at 458–59).

64. THE ROYAL CHARTER FOR INCORPORATING THE HUDSON’S BAY COMPANY 17 (1816).

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Of course, the charter itself derived its authority from the authority of the King, and the provenance of that authority is explicit: “Charles the Second, by the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith.”⁶⁵ Of course Blackstone would agree that “lay” corporations “might serve ‘the promotion of piety.’”⁶⁶ They could do so because the governmental system of England was suffused with piety, the king’s authority still at least nominally dependent on the divine. In an era in which corporations could colonize, wage war, and exercise governmental authority, it is hardly surprising that they could also be instruments of the *state*’s religious aims. That said, it hardly takes a close reading of any of the charters granted to realize that they also strictly limited what the corporation could do. They could do what was authorized and that the charters authorized plural aims, including religious ones, is equally unsurprising. They did not, however, contain anything like the open-ended “any lawful ends” clause common to modern business corporations.

The states, as successors to the King-in-Parliament, had the authority to charter corporations, and they did so. State legislatures chartered many corporations. They did not, however, charter many business corporations until the Jacksonian era. With that said, they did charter religious and charitable corporations aplenty. Indeed, the first general incorporation laws were for religious corporations.⁶⁷ That is, it was for religious corporations that states first prescribed processes whereby a body of human beings could seek a charter of incorporation. Business corporations very slowly followed suit. For much of the nineteenth century, state law prescribed the various categories of businesses eligible for charters granted under the authority of specific statutes. These categories were primarily types of businesses. For example, among the category of businesses regularly provided for were mines. To form a mining corporation, the incorporators seeking a charter usually needed to specify where the mines were going to be and where the ores or materials to be extracted were located. Transportation was another category in some jurisdictions, but, often, even that category was divided into specific types of transportation: plank road, canal, bridge, or the like. In some jurisdictions, no such general category existed, and only the transportation category was

65. *Id.* at 1.

66. *Hobby Lobby*, 134 S. Ct. at 2770 n.23 (citing 1 BLACKSTONE, *supra* note 61, at 458–59).

67. GEORGE HEBERTON EVANS, JR., BUSINESS INCORPORATIONS IN THE UNITED STATES 1800–1943 (1848); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 134 (1970); Gordon, *supra* note 53, at 389; see Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 82 (1993).

mentioned. Inevitably the charter specified the place of the bridge, the route of the canal or the road, and many other limiting features.

By the time of the first industrial revolution, and with the impetus of Jacksonian democracy, the category of commercial corporation grew in prominence. That said, what we regarded as the typical corporation at the beginning of the twenty-first century did not yet exist. Save for railroads and a few financial corporations, such as banks and insurance companies, no archetypical business corporations existed. The limits on those corporations were also embodied in their charters and the limiting characteristics were prominent. They often included limits on the lifespan of the corporation, the capital the corporation could accumulate, and specification of the liability of shareholders for the debts of the corporation, and the like. To state the obvious, none of those terms were common, if they existed at all in any charter, at the start of the twenty-first century.

The limiting characteristics of the charter were taken seriously. Courts could, and did, invoke the doctrine of *ultra vires* to render corporate acts null and sometimes void. Among the most prominent acts declared *ultra vires* were the charitable acts of corporations. Indeed, it took special legislative permission, in the form of statutes, to authorize charitable acts by corporations. Why was this? One could credit a formalist reading of the charters. But, to do so would do violence on the underlying principles. If one thinks of the virulent anticorporate sentiment of the nineteenth century and the concern that monied corporations—a phrase common then—would corrupt the body politic, then limiting what corporations could do and strictly construing the charters embodying those restrictions made sense.

Moreover, state legislatures understood that human sentiment could express itself in action and that action could be organized; they just wanted to keep like things together and different things apart. Again, formalism is a possible explanation, but democratic fear of concentrated economic and sociopolitical power is a better one. Take but one example: consider the debate over the chartering (and especially the rechartering) of the national bank.⁶⁸ That it was a congressional charter emphasized, rather than detracted from, the fear because the bank's scope and scale was national rather than limited. It is not controversial that the congressional charter was accused of embodying a particular vision of politics.⁶⁹ Procommercial and centralizing in its effect, it was anathema to agrarians and republicans

68. *M'Culloch v. Maryland*, 17 U.S. 316, 413, 421 (1819).

69. Indeed, it was not upheld as an expression of private power but as an instrument of federal policy. *Id.* at 421.

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alike who viewed it as an expression of royalism, at worst, or of America's dying old order, at best. Suffused with Hamiltonian ambitions for the economy, which were profoundly mercantilist and nationalist, it could not survive Jacksonian infant capitalism, which was, while commercial, an agent of localism and social mobility.⁷⁰ State-based institutions fared little better in the public eye because, before the Jacksonian era, charters were often seen as the equivalent of monopoly grants, which they often were, stifling innovation and economic activity rather than enhancing it.⁷¹ In other words, the relationship between corporate chartering, state power, mercantilism, and capitalism was fluid, not static.

Economic dynamism obviously won in the end, but how economic dynamism expressed itself in corporate chartering lies at the heart of how to read enabling statutes. Reading those statutes is the task, or at least one of the tasks, that the Court faced in *Hobby Lobby*. The corporate enabling statutes grew out of jurisdictions emulating the statutes of New Jersey, and immediately on the Garden State's heels, West Virginia and Delaware. These states competed to become the jurisdiction of choice for corporations that were forming to take advantage of the simultaneous rise of businesses commercializing the fruits of the second industrial revolution and the rise of a securities market—especially an equities market—as large business enterprises, which had been partnerships or family enterprises, became, for as variety of reasons, publicly held.

Two aspects of business behavior and one aspect of state corporate law are relevant to reading the enabling statutes in that environment. These aspects are: (1) capital mobility and innovation; (2) vertical integration; and (3) the retention of nonbusiness categories of incorporation. The first aspect expressed itself in the collapse of business enterprise categories. The second aspect expressed itself in the creation of holding companies and subsidiaries. The third aspect expressed itself in boundary preservation and managerial accountability.⁷² The enabling statutes used peculiar language pertaining to purpose and business; however, understanding this language

70. See generally ARTHUR MEIER SCHLESINGER, JR., *THE AGE OF JACKSON* 334–41 (1945) (describing Jacksonian democracy and industrialism); SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 44 (2005) (describing Hamiltonian and Jacksonian models).

71. See generally STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* 45–47 (1971) (explaining Judge Marcus Morton's view of charter grants).

72. See generally Jonathan Levy, *From Fiscal Triangle to Passing Through: Rise of the Non-profit Corporation* (Tobin Project Working Paper (on file with author)).

is vital to understanding the enabling character of the statutes. Moreover, appreciating the relevance of boundaries in the late nineteenth and early twentieth centuries is key to understanding the politics and jurisprudence of those statutes.

First, with regard to capital mobility and innovation, the second industrial revolution involved the creation of the petrochemical world and the application of electricity to mechanical tasks. It was a period of intense innovation, and commercializing the products of the febrile technical minds of the time was key to economic well-being and power.⁷³ Containing that technical imagination in limited corporate categories strictly inhibited commercialization. Imagine, if you will, incorporating a business to manufacture and operate a system of telegraphy. Telegraphy was a communicative means and the subject of much research, and it was conducted by some of the greatest technical minds of the time, in America and elsewhere, notably, Samuel Morse, Alexander Graham Bell, Thomas Edison, and Ernst Werner von Siemens. From telegraphy sprang other innovations, the telephone most obvious among them.⁷⁴ Now, suppose that a charter of incorporation specified that the business was to manufacture and operate telegraphs. Improvements in the telegraph generated the telephone, a superior form of communication. But, the telegraph company could not manufacture and operate the telephone system because, strictly construed, to do so would be ultra vires to its charter. Good lawyering helps to solve this difficulty. A corporation could include a laundry list of aims in its charter. It could also take another approach by inserting a catchall phrase, such as “and any other business the directors specify.” The first works, but it is obviously just a cumbersome version of the simple charter and, for the same reason, ultimately inadequate. The second potentially violates the categories of state law limiting corporate acts to an individual category of business, say, transportation. Moreover, it inhibits transfers of capital from an enterprise that is waning to one that is waxing, instead requiring awkward transfers of capital out of one corporate treasury to a financial intermediary and then to another corporate enterprise. This would be easy enough if all the enterprises were owned by a single individual or family, but it would be much more awkward if they were not. If transportation is the category (think ferry, steamboat, and railroad), the name Vander-

73. JOYCE APPLEBY, *THE RELENTLESS REVOLUTION: A HISTORY OF CAPITALISM* 167, 254 (2010).

74. PAUL ISRAEL, *EDISON: A LIFE OF INVENTION* 130 (1998); RICHARD R. JOHN, *NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS* 1–2 (2010).

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bilt will automatically come to mind.⁷⁵ Much better to eliminate the categories and allow intracorporate transfers of wealth. That is what happened.

Second, with regard to vertical integration, recall transportation and mining—two of the most hoary categories. Think railroad and coal mining: Would a court considering a railroad's purchase of a coal mine bother to consider whether the spot market for coal was too volatile for a railroad to price its tickets or freight rates appropriately, whether long-term contracts were too vulnerable to breach, or attempts to corner a market in deciding whether that purchase was *ultra vires*? Doubtful. Those, after all, were business not legal considerations. Or, think oil drilling and pipelines: enabling corporate codes also brought about something the corporate person had not been able to do (because it was considered *ultra vires*), buy and sell the equity of other corporations and create other corporations.⁷⁶ Sometimes, too, these devices enabled horizontal integration, better known by its popular term “monopolization.” These combinations became classic business forms, whether styled as holding companies, active parent corporations with subsidiaries, or otherwise. The key is that the entire enterprise structure was designed to create wealth, but sometimes the purpose for which some of the entities were created was to serve the operation of other parts of the enterprise structure. Having made those purposes legal, the enabling statutes let entrepreneurs use them. That then is, as a historical matter, what the statutes meant when first enacted.

Finally, when states enacted the enabling statutes, they did not eliminate the capacity for human beings to organize bodies to further their faith, to engage in charity, and to do good works. To the contrary, those statutes remained on the books and were adjusted over time—just as the business corporate codes were adjusted over time. If one reads the business codes as literally as the U.S. Supreme Court apparently does, then the states have operated under a self-induced illusion for more than a century—since they first awakened to general corporate codes in the 1890s. If one can incorporate for any lawful purpose under the business code, and the object of the business need not be to make a profit, then why bother with all other corporate codes? Why

75. See generally T.J. STILES, *THE FIRST TYCOON: THE EPIC LIFE OF CORNELIUS VANDERBILT* (2009) (explaining the empire and ruthlessness of Cornelius Vanderbilt who built his wealth in various modes of transportation).

76. Think, for example, of the trusts that sometimes became holding companies (e.g., the evolution of the Rockefeller oil empire, the Havemeyer sugar empire, and others that were dominant in the last years of the nineteenth century).

engage in acts so fantastically redundant, so wasteful of legislative energies, and so misleading to the public for so long? Indeed, the Court seems to know that its literal reading cannot be accurate, even if one simply limits herself to reading the enabling statutes for business corporations. The U.S. Supreme Court goes out of its way to note, for example, that:

In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing non-profit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half the States, for instance, now recognize the “benefit corporation,” a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.⁷⁷

If the Court is correct in its reading, why bother enacting statutes to create a “benefit corporation?” In any case, the enabling statutes already allow corporations to pursue these aims by creating—as I have suggested—entities that are explicitly nonprofit (a point the Court makes in a footnote).⁷⁸ Finally, if, as the Court says, the compatibility between profit and nonprofit goals is inherent, then we must ask: Inherent in what? Inherent in the business corporation? Was it something so inherent that it was missed for centuries by practitioners, courts, and scholars? If inherent, why the concern about the creation of intermediary institutions in liberal democracies? If inherent, why the limiting characteristics of corporate law for so long—its categories of business activity and its doctrines like *ultra vires* and fiduciary duty? If inherent, why the controversy over the multifiduciary scholarship of the 1970s and 1980s?⁷⁹ If inherent, why the other forms at all? It is not enough to suggest, as the Court does, that tax and lobbying laws lie behind the different forms.⁸⁰ The Court’s sequencing is entirely backwards. The corporate income tax post-dated corporate law. Similarly, lobbying restrictions on corporate activity came into effect—by definition—after the existence of corporations. Clever lawyers take advantage of the categories to enable corporations to act indirectly when they are prohibited from acting directly.

IV. CONCLUSION—TWO METHODS OF READING

In analyzing the correctness of a court’s decision, commenters employ a variety of approaches. Of course, we all engage in one ap-

77. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014) (citing S.C. CODE ANN. §§ 33-38-300, 33-38-130 (Supp. 2012); VA. CODE ANN. §§ 13.1-787, 13.1-626, 13.1-782 (2011)).

78. *Id.* at 2771 & n.24.

79. William W. Bratton, *Game Theory and the Restoration of Honor to Corporate Law’s Duty of Loyalty*, in *PROGRESSIVE CORPORATE LAW* 139, 139–43 (Lawrence E. Mitchell ed. 1995).

80. *Hobby Lobby*, 134 S. Ct. at 2771 & 2771 n.24.

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proach, which is to ask whether, under the analytic approach of the common law, even applied to constitutional law, the decision is consonant with prior law, consistency of application being a normative democratic principle. That is, of course, also what U.S. legal education is all about. It is also an approach common to many of the papers we have read. Another approach is to ask whether the decision is consistent with, or enhances, the norms of society, even if, perhaps, it deviates from precedent. Included in this approach are questions of policy preferences. In *Hobby Lobby*, the Court adopted both approaches. It maintained that its decision was consistent with both U.S. law and mores.

But, the Court also adopted a particular way of reading that is antecedent to its claims of consistency and legitimacy. It claimed that the words in question definitively mean certain things—not that they may be taken to mean certain things, for that would imply novelty—but that they mean certain things. I freely admit that I am not enough of a postmodernist to adopt, without hesitation, the complete indeterminacy of language. I want to hold the Court to its own method and see what happens. If the Court's own method does not make sense of the record, then we must ask if a different approach is better. So, I have argued that applying the Court's own understanding of corporate personhood fails. It fails as a matter of understanding the Dictionary Act, on which it relies, and it fails in its understanding of the corporate person as nothing more than a strict expression of the corporation's owners' ambitions, or even its other constituencies. If that is the case, then does its reading make sense of the business corporation as conceived of under the statutes that enable its creation? Are the owners, human or not, empowered to seek the RFRA exemption that the corporations seek? If I am correct, the answer is no. Little in the evolution of the business corporation supports these actions as acts attributable to the place of business corporations in our society. Moreover, little in the evolution of corporate law suggests that owners and managers are free to use the corporate form to advance the aims they seek to advance, at least under the forms provided by Oklahoma and Pennsylvania and used by the entrepreneurs who created Hobby Lobby, Conestoga, and Mardel. Thus, when the Court says that HHS presents the entrepreneurs with a "difficult choice,"⁸¹ is it really saying that the choice is a Hobson's Choice, phrased as a rhetorical question? Do entrepreneurs give up the right to seek judicial protection of

81. *Id.* at 2767.

their religious liberty or forgo the benefits that are available to their competitors of operating as corporations? The answer is yes. That is what it means to be a separate legal person under U.S. law.